

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LUSH KOLAJ,

Defendant-Appellant.

UNPUBLISHED

October 26, 2006

No. 262205

Wayne Circuit Court

LC No. 03-013067-01

Before: Murray, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of uttering and publishing forged instruments (3 counts), MCL 750.249, obtaining money by false pretenses with intent to defraud, \$1,000 or more but less than \$20,000 (2 counts), MCL 750.218(4)(a), obtaining money by false pretenses with intent to defraud over \$20,000, MCL 750.218(5)(a), and claiming money from a gambling game with intent to defraud, MCL 432.218(2). We affirm in part, reverse in part, and remand for further proceedings. This case arose after defendant tampered with three gaming tickets issued by a casino. He cashed the first “winning” ticket himself, receiving \$1,000. On the last day of the promotion, he arranged for an acquaintance to cash a second \$1,000 ticket, and he gave her \$300 for her trouble. In exchange for an even split of the proceeds, he also arranged for his cousin to cash a \$1 million ticket the same day, but that ticket was never paid. Investigators inspected the tickets and discovered evidence of tampering, and the jury, on the basis of that evidence, convicted defendant on all charges.

On appeal, defendant argues that the trial court erred in denying his motion for directed verdict. We disagree with defendant’s general arguments, but agree that defendant’s conviction for receiving more than \$20,000 under false pretenses should be reduced to an attempt. We remand the case for a corresponding amendment to the judgment order and resentencing on this one count. “When reviewing a trial court’s decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.” *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). “[I]t is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.” *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

A defendant is guilty of uttering and publishing if the defendant presented a forged instrument for payment, intending to defraud the payer and with knowledge that the instrument was false. MCL 750.249; *People v Dukes*, 189 Mich App 262, 265; 471 NW2d 651 (1991). A defendant is guilty of false pretenses if he falsely represents an existing fact, knows the representation is false, intends to deceive the victim, and the victim provides a valuable money or service in reliance on the false representation. MCL 750.218(4)(a) and (5)(a); *People v Reigle*, 223 Mich App 34, 37-38; 566 NW2d 21 (1997). A defendant is guilty of claiming money from a gambling game with intent to defraud if a defendant “claims, collects, takes, or attempts to claim, collect, or take money or anything of value in or from the gambling games, with intent to defraud, without having made a wager contingent on winning a gambling game, or claims, collects, or takes an amount of money or thing of value of greater value than the amount won.” MCL 432.218(2)(j). A jury may infer intent and knowledge from a defendant’s actions. *People v American Medical Centers of Michigan, Ltd*, 118 Mich App 135, 154; 324 NW2d 782 (1982).

Viewing the evidence in the light most favorable to the prosecution, the prosecutor presented sufficient evidence to support defendant’s convictions on all but one of these charges. Craig Balliet, a forensic laboratory chemist and expert in lottery ticket examination, concluded that the tickets at issue were compromised by a “tape-lifting technique.” Not only was there tape on the tickets, but also the tape had been cut around the winning symbols. Balliet demonstrated the cheating technique to the jury, and testified that defendant’s tickets had all the earmarks of a successfully performed technique. Balliet noted that there would be no reason to cut the tape around the winning symbols if defendant’s intent in taping over the scratch-away coating was to preserve the ticket, as defense counsel suggested, because the symbols would be visible through the transparent tape without cutting the tape from those areas. Additionally, black lines that were printed on the ticket as a security feature were distorted. Balliet concluded that the only reason tickets would be taped and cut the way defendant presented them would be to determine the location of the winning symbols before finally removing the scratch-away coating.

The testimonial evidence surrounding the presentation of the tickets also incriminated defendant. The woman who cashed defendant’s second ticket testified that defendant had instructed her not to answer any questions at the casino concerning where she got the tickets. He also told her not to go to court after she was subpoenaed. Defendant gave her \$300 for presenting the \$1,000 ticket and offered his cousin half the prize money for presenting the \$1,000,000 ticket. In light of these circumstances, sufficient evidence supported defendant’s uttering and publishing conviction and his conviction for claiming money from a gambling game with intent to defraud. In light of the casino’s payments to defendant and his female assistant of \$1,000 each, there was also sufficient evidence to convict defendant of two counts of obtaining \$1,000 or more through false pretenses.¹

However, the casino never paid the \$1,000,000 prize for the third ticket. It merely presented the ticket to its underwriter for verification. The statute clearly requires that a victim

¹ We note that the probability of scratching one winning ticket is 53,130 to 1. The probability of scratching three winning tickets is 149,975,199,297,000 to 1.

must transfer some valuable service or property to the defendant before the crime of obtaining money or services by false pretenses is complete. MCL 750.218(1). Moreover, the gravity of the crime is determined by the value of the “amount obtained.” MCL 750.218(5)(a).² Here, the trial court did not adequately outline the requirements of this particular charge, and the proofs never indicated that defendant “obtained” the \$1 million that would support his conviction of receiving over \$20,000. On the contrary, the undisputed evidence indicated that the casino never parted with the \$1 million prize. Therefore, the prosecution failed to meet its burden of proof on this charge, and defendant’s conviction on this count is accordingly reduced to an attempt to receive \$20,000 or more by false pretenses. MCL 750.92; *People v Wogaman*, 133 Mich App 823, 828; 350 NW2d 816 (1984). We reverse defendant’s conviction on this count alone, and remand for resentencing and the ministerial amendment of the judgment order to reflect defendant’s conviction on the lesser offense. *Wogaman, supra*.

Defendant next argues that the prosecutor’s remarks during closing argument were improper because she shifted the burden of proof. We disagree. We review unpreserved issues of prosecutorial misconduct for plain error. *Aldrich, supra* at 110. If a timely curative instruction could have alleviated the prejudicial effect of the misconduct, there is no error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). The issue defendant raises is nearly identical to the one raised in *People v Sanders*, 163 Mich App 606, 610-611; 415 NW2d 218 (1987). Like the prosecutor in *Sanders, supra*, the prosecutor in this case told the jury, “I want to talk to you about some of the things that defense counsel indicated that they [sic] were going to prove to you and didn’t.” Specifically, the prosecutor pointed out that defense counsel had promised in his opening statement to present evidence (1) that defendant had accumulated 200 or 300 tickets from various legitimate sources, (2) that he legitimately scratched the tickets and applied the tape to protect them, (3) that defendant had been in this country illegally for 21 years, and (4) that there was a “perfectly logical explanation” for defendant to ask Maryanovska and Tomaj to cash the tickets for him. Not once during closing argument did the prosecutor comment on defendant’s failure to testify or ask defense counsel to prove defendant’s innocence. See *id.* at 610-611. In context, the prosecutor “merely stated that defendant had not shown what he said he was going to show in his opening statement.” *Id.* at 611. The prosecutor’s comments did not amount to plain error, and any improper prejudice could have been cured by a timely instruction. *Ackerman, supra*.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Peter D. O’Connell
/s/ Karen M. Fort Hood

² Even the jury’s verdict form reflected this requirement, asking the jury if defendant was “GUILTY OF OBTAINING \$1,000,000 UNDER FALSE PRETENSES” or “NOT GUILTY.” The jury checked the box next to the first proposition, even though the evidence clearly reflected that the casino never released the \$1 million prize to defendant or his agents.